

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of Section 73.606(b))
Table of Allotments,)
TV Broadcast Stations.)
(Sioux Falls, South Dakota))

MM Docket No. 95-136
RM-8682

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COMMENTS

Midcontinent Television of South Dakota, Inc. ("Midcontinent"), licensee of Television Station KELO-TV, Sioux Falls, South Dakota, by its attorneys, hereby comments upon the FCC's above-captioned Notice of Proposed Rulemaking, DA 95-1837, slip op. (released August 28, 1995). Midcontinent submits these comments for the purpose of clarifying that the reference transmitter site specified by the petitioner, Red River Broadcast Corporation ("Red River"), is unavailable to it and could not be relied upon as the actual site for the facility proposed.

Red River previously filed an application to construct a new television facility on UHF Channel 36 to provide service at Sioux Falls, South Dakota, in which it specified a transmitter site at the geographic coordinates 43° 31' 19" North Latitude and 96° 32' 05" West Longitude. See Application, FCC File No. BPCT-941227KI. Red River proposed to operate this station in conjunction with its currently-licensed Channel 5, serving Mitchell, South Dakota. See Petition for Rulemaking, RM-8682 (filed July 12, 1995) ("Petition").

Three days before the cut-off deadline established by the FCC with respect to Red River's application, an additional application for Channel 36 was filed with the FCC. As a result, Red River could have been forced to go through a comparative hearing with the other applicant. The resolution of this process would have been significantly prolonged by the current uncertainty concerning the criteria relevant in such a comparative proceeding. See Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993).

In order to avoid delay in the provision of new service, Red River filed its Petition with the FCC requesting the additional allotment of Channel 46 at Sioux Falls. See Petition at 2. The engineering report accompanying Red River's Petition specified geographic coordinates for the tower site that were different from those proposed in its application for Channel 36. See Petition, Engineering Report at 1. In fact, the tower site coordinates identified in the Petition (43° 31' 07" North Latitude, 96° 32' 05" West Longitude) are the coordinates for the site co-owned by Midcontinent and used by KELO-TV and KSFY-TV (the "Rowena Tower Site").^{1/} Thus, despite the fact that Red River has a construction permit application pending that certifies its reasonable assurance that a specific transmitter site is available to construct a new television broadcast facility at Sioux Falls, it has chosen to identify the Rowena Tower Site transmitter site as the reference site for the Channel 46 allotment.

^{1/} Curiously, the NPRM lists yet a third set of reference coordinates for the proposed Channel 46 allotment. Midcontinent is uncertain whether this is merely a transcription error, or identifies another alternative transmitter site.

The NPRM anticipates that, if Channel 46 is allotted as proposed, Red River would be permitted to modify its pending Channel 36 application to specify operation on Channel 46 without losing the cut-off protection gained from its original application. See NPRM, DA 95-1837, slip op. at ¶ 3-4.^{2/} In such circumstance, Midcontinent would apparently have no formal opportunity to oppose Red River's proposed use of the Rowena Tower Site in the event that Red River modifies its pending application to specify the KELO-TV transmitter coordinates identified in its Petition. Accordingly, Midcontinent takes this opportunity to bring to the Commission's attention the fact that Red River has no agreement with it for use of the Rowena Tower Site. Red River has approached Midcontinent in the past concerning the possible use of the Rowena Tower Site for a new television station, and Midcontinent has rejected its proposal.^{3/} Red River therefore cannot rely on the use of that site in any construction permit application; the submission of an amendment to

^{2/} Citing, e.g., Albion, Nebraska, 10 FCC Rcd 3183 (1995), aff'd FCC 95-265 (June 27, 1995).

^{3/} No Commission rule could require Midcontinent to provide Red River with access to the KELO tower. The FCC's rules make provision for compelled access to a "unique site" only where no suitable alternative sites are available. See 47 C.F.R. §73.635 (1994). As Red River's own application for Channel 36 indicates, other sites are available for construction of a new television broadcast facility providing city-grade coverage of Sioux Falls.

the pending Red River application proposing a transmitter at the coordinates identified in the Petition would constitute a material misrepresentation of fact.^{4/}

Respectfully submitted,

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^{4/} Whereas a petitioner for a new allotment need only show that a "theoretical site" exists that complies with the FCC's technical requirements (see, e.g., Pinckneyville, Illinois, 41 R.R.2d 69, 71, (1977)), an applicant must have reasonable assurance that the site specified is actually available. See FCC Form 301, Section VII, Question 2.

CERTIFICATE OF SERVICE


I, Sharon Krantzman, hereby certify that true and correct copies of the foregoing Comments were sent by first-class, postage prepaid mail, this 19th day of October, 1995, to the following:

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